

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LEONARD P. GORSKI	:	DETERMINATION DTA NO. 818167
for Redetermination of Deficiencies or for Refund of New	:	
York State and New York City Personal Income Taxes	:	
under Article 22 of the Tax Law and the New York	:	
City Administrative Code for the Period from	:	
March 1, 1993 through December 31, 1996.	:	

Petitioner, Leonard P. Gorski, 310 Seaview Circle, Neptune, New Jersey 07753, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the period from March 1, 1993 to December 31, 1996.

A hearing was held before Gary R. Palmer, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 29, 2002 at 1:15 P.M., with post-hearing submissions to be submitted by July 1, 2002, which date began the three-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Nicholas Masi and Inez Ottaviano).

ISSUE

Whether petitioner's liability for penalty pursuant to Tax Law § 685(g) as a person required to collect, truthfully account for and pay over withholding tax with respect to LPG

Associates, Inc., is limited by the fact that there may be another person who is also liable for the penalty by operation of law or by agreement to indemnify.

FINDINGS OF FACT

1. LPG Associates, Inc. (Federal identification number 22-3057750) during the period at issue was a subchapter S corporation incorporated in the State of New Jersey in 1990, and is hereinafter referred to as LPGNJ. LPG Associates, Inc. (Federal identification number 13-3721075) during the period at issue was a C corporation incorporated in the State of New York in 1993, and is hereinafter referred to as LPGNY. During the period at issue both corporations maintained offices for the conduct of their business at 3 Courtlandt Street, Mt. Vernon, New York 10550.

2. During the period at issue petitioner owned 100 percent of the issued shares of LPGNJ and 50 percent of the issued shares of LPGNY. The remaining 50 percent of the issued shares of LPGNY were owned by one Charles J. Diven.

3. On its United States income tax returns, form 1120S, for 1994 and 1995, LPGNJ claimed a deduction for taxes paid to New York State, New York City and New Jersey.

4. During the years at issue petitioner signed at least one employer's quarterly Federal tax return, form 941, and at least one New York State quarterly withholding and wage reporting return, form WT-4-A, both on behalf of LPGNJ. He also had and exercised check signing authority for at least one of the corporations.

5. On December 23, 1996 petitioner signed a written agreement with Charles J. Diven whereby petitioner agreed to transfer his entire interest in LPGNY and LPGNJ and a third corporation to Mr. Diven in return for consideration that included the assumption by Mr. Diven

and the three corporations of certain specified obligations and liabilities of the three corporations, including payroll withholding tax owed by LPGNJ to the United States.

6. On April 15, 1999 the Division of Taxation (“Division”) issued eight notices of deficiency to petitioner as an officer or responsible person of LPG Associates, Inc., seeking to impose penalty pursuant to Tax Law § 685(g) for unpaid New York State and New York City withholding tax due as follows:

Tax period ending	Notice number	Tax jurisdiction	Penalty amount
June 30, 1993	L016230413	NYS	\$1,583.50
June 30, 1993	L016230412	NYC	\$ 792.00
September 30, 1993	L016230413	NYS	\$2,895.75
September 30, 1993	L016230412	NYC	\$ 792.00
December 31, 1993	L016230413	NYS	\$2,895.75
December 31, 1993	L016230412	NYC	\$ 792.00
March 30, 1994	L016230411	NYS	\$ 83.97
March 30, 1994	L016230410	NYC	\$ 377.36
June 30, 1994	L016230411	NYS	\$1,343.83
June 30, 1994	L016230410	NYC	\$ 377.36
September 30, 1994	L016230411	NYS	\$1,343.83
September 30, 1994	L016230410	NYC	\$ 377.36
December 31, 1994	L016230411	NYS	\$1,343.83
December 31, 1994	L016230410	NYC	\$ 377.36
March 30, 1995	L016230409	NYS	\$ 808.87
March 30, 1995	L016230408	NYC	\$ 597.12
June 30, 1995	L016230409	NYS	\$1,396.08
June 30, 1995	L016230408	NYC	\$ 597.12
September 30, 1995	L016230409	NYS	\$1,396.08

September 30, 1995	L016230408	NYC	\$ 597.12
December 31, 1995	L016230409	NYS	\$1,396.08
December 31, 1995	L012230408	NYC	\$ 597.12
March 30, 1996	L016230407	NYS	\$1,749.40
March 30, 1996	L016230406	NYC	\$ 559.30
June 30, 1996	L016230407	NYS	\$1,749.40
June 30, 1996	L016230406	NYC	\$ 559.30
September 30, 1996	L016230407	NYS	\$1,749.40
September 30, 1996	L016230406	NYC	\$ 559.30
December 31, 1996	L016230407	NYS	\$1,749.40
December 31, 1996	L016230406	NYC	\$ 559.30
Total			\$31,996.29

7. Following petitioner's request for a conciliation conference with the Bureau of Conciliation and Mediation Services, the eight notices of deficiency were sustained by conciliation order dated August 25, 2000. On November 28, 2000 petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order, wherein he stated:

LPG Associates, Inc. was a corporation with two stockholders. The Commissioner of taxation has not taken this fact into consideration when assessing the penalties and interest.

SUMMARY OF THE PARTIES' POSITIONS

8. Petitioner maintains that because Mr. Diven was a 50-percent shareholder of LPGNY, and because all business was transacted through LPGNY, and not LPGNJ, the Division cannot hold petitioner accountable for more than 50 percent of the withholding tax penalty due.

9. Petitioner further avers that pursuant to the terms of the written agreement entered into by petitioner and Mr. Diven on December 23, 1996, Mr. Diven and the corporations assumed

responsibility for the withholding penalties due and are responsible to indemnify petitioner for any such penalties that were incurred prior to August 31, 1996.

10. The Division contends that it determined petitioner was a 100-percent shareholder of LPG Associates, Inc., and that prior to the hearing, it was not aware that there were two separate corporations with the same name or that there was a second responsible officer of one of the corporations. The Division maintains that if there was a second responsible officer, then that officer and petitioner are each liable for 100-percent of the penalty due.

CONCLUSIONS OF LAW

A. The Division determined that petitioner was a person as defined in Tax Law § 685(n) who willfully failed to collect or truthfully account for and pay over withholding tax due to New York State and New York City from LPG Associates, Inc. for the period from March 1, 1993 through December 31, 1996, and who was therefore liable for a penalty equal to the total amount of the tax evaded, not collected or not accounted for and paid over in accordance with Tax Law § 685(g).

B. Petitioner does not deny that he was an officer or employee of LPGNY and LPGNJ, who was under a duty to pay over the withholding tax at issue to New York State and New York City and who willfully failed to account for and pay over the tax at issue. His position is that all business in New York was conducted through LPGNY, and because Mr. Diven was a 50-percent shareholder of LPGNY, the Division must look to Mr. Diven for half of the withholding penalty now due, leaving petitioner liable for not more than the remaining 50-percent.

C. While petitioner claims that all business in New York was conducted through LPGNY rather than petitioner's wholly-owned subchapter S corporation, LPGNJ, he has failed to account for why, on the 1994 and 1995 forms 1120S, deductions were taken for taxes paid by LPGNJ to

New York State and New York City. These deductions support a clear inference that LPGNJ was conducting business in New York State and New York City during the period at issue and that petitioner, as the sole shareholder of LPGNJ, was solely responsible for the withholding tax penalty due.

D. The main thrust of petitioner's argument is that because Mr. Diven owned 50-percent of the shares of LPGNY during the audit period, the Division must look to Mr. Diven for half of the penalty due, and is prohibited from pursuing its claim against petitioner for more than half of the penalty. Unfortunately for petitioner, liability for penalty under Tax Law § 685(g) is joint and several (*Matter of Muffoletto*, Tax Appeals Tribunal, June 19, 1997). Black's Law Dictionary, Fifth Edition, defines joint and several liability as follows:

A liability is said to be joint and several when the creditor may sue one or more of the parties to such liability separately, or all of them together at his option.

* * *

Such liability permits the Internal Revenue Service to collect a tax from one or all of several taxpayers.

It is clear from the record that prior to the hearing in this matter the Division was unaware that anyone other than petitioner had any interest in that entity known to it as LPG Associates, Inc., and unaware that there was more than one corporate entity using that corporate name. The corporate documents placed in evidence by the Division all used the same Federal identification number, that of the subchapter S corporation which was entirely owned by petitioner.¹ The Division cannot be faulted for not having discovered the existence of LPGNY in time to assess Mr. Diven before the expiration of the period of limitations.

¹The New York State withholding and wage reporting return, form WT-4-A, has as its Federal identification number 133057750 rather than 22-3057750.

E. The petition of Leonard P. Gorski is denied and the eight notices of deficiency are sustained.

Dated: Troy, New York
August 29, 2002

/s/ Gary R. Palmer
PRESIDING OFFICER